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No. 07-1337

Supreme Court, U.S.
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In The

Supreme Court of the United States

JUAN CARLOS CALDERON-DOMINGUEZ,

Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Juan Carlos Calderon-Dominguez's petition presents to the Supreme Court an important question which determines whether aliens legally present in this country will be allowed to remain in this country, or will be banished for life: Whether the immigration agency and the lower courts are bound by the rules laid down by the United States Supreme Court, or whether judicial rulings based on the incorrect application of a clearly established Supreme Court rule will stand.

It is well known that the Supreme Court rarely grants certiorari for the purpose of correcting errors below, particularly in the case of unpublished opinions. However, this creates a significant loophole through which bad decisions can be applied to politically disfavored litigants with no possibility of review. Where the law is clear, and is clearly misapplied, this Court's involvement will be minimal, but the consequences for Petitioner and others similarly situated will be tremendous.

The law in this case is clearly established. This Court has established the "categorical approach" for determinations of whether a criminal conviction falls within a particular category of crime for the purpose of sentence enhancement. *Taylor v. United States*, 495 U.S. 575 (1990). This approach was elaborated on in *Shepard v. United States*, 544 U.S. 13 (2005), which described in more detail the sources of information a court could rely on to make such a determination.

The so-called *Taylor-Shepard* categorical approach has been applied to immigration proceedings for the purpose of determining whether a criminal conviction falls into a category of crimes which render an alien removable. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) ("In determining whether a conviction (say, a conviction for violating a state criminal law that forbids the taking of property without permission) falls within the scope of a listed offense (e.g., 'theft offense'), the lower courts uniformly have applied the approach this Court set forth in *Taylor*. . . .").

The law in this case was clearly misapplied. As explained more fully in Petitioner's Brief, the Fifth Circuit erred by failing to correctly apply the *Taylor-Shepard* categorical approach to Petitioner's case, finding that Petitioner pled guilty to a "crime involving moral turpitude" (CIMT) as defined under 8 U.S.C. § 1227(a)(2)(A)(i)(I) by looking to documents which fall outside the permissible range of documents the court can consult under *Shepard and Taylor* and relying on facts not necessary for the conviction and explicitly not found by the judge. This erroneous application of clearly established law will stand, and Petitioner will be removed from this country and nuclear American family destroyed, if this Court does not correct the Fifth Circuit's error.

1. Respondent argues that the court of appeals did not err, and thus no further review is warranted. Resp. Br. at 5. Respondent argues that under the rule announced in *Shepard*, "the details of a . . . charging

document" can be used by the court to determine if a crime meets the federal definition of CIMT for immigration purposes. 544 U.S. at 6.

Respondent misstates the law. Under Fifth Circuit precedent opinion, the charging document can be used for the limited purpose of determining the subsection of a statute to which the defendant pleaded guilt, if it is not otherwise clear from the conviction record. *United States v. Villegas-Hernandez*, 468 F.3d 874, 883 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1351 (2007); *Omari v. Gonzales*, 419 F.3d 303, 308-09 (5th Cir. 2005); *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001).

It is not permissible to use the charging instrument to determine what, in fact, the defendant *did*, as a charging instrument is merely an accusation. The facts alleged in a charging document are not necessarily the same as those proven in a bench or jury trial, or pled to in a plea agreement; indeed, it is the difference between what is alleged and what can actually be proven which makes for all the drama of the courtroom. Thus when the allegations in a charging document are not necessary for the finding of guilt, the allegations in the charging document cannot be used as if they were proven fact. This is particularly the case when there is contradictory evidence regarding those allegations.

Here, for example, the charging document, Ms. Luna's affidavit, states that Petitioner's victim was his wife, Maricruz Calderon. (A.R. 108.) The specific elements of the crime to which Petitioner pled guilty did not require that the victim be a family member; the crime to which he pled was simple assault, not a domestic violence charge. Further, the court specifically found that the crime did *not* involve family violence. (A.R. 110.) Thus we have here an allegation (Petitioner's victim *was* a member of his family), a conviction record (Petitioner's victim could be anyone, including a member of his family), and a judicial finding of fact (Petitioner's victim was *not* a member of his family) – and the Immigration Judge must determine which conclusion applies. It is common sense that a bare allegation should not trump a judicial finding of fact. And of course the law states that it must be so: the charging document is not a source of *facts*. It is to be used to determine *only* which subsection of a crime must have been the one the defendant had been charged with violating. *Villegas-Hernandez*, 468 F.3d at 883; *Omari,* 419 F.3d at 308-09; *Calderon-Pena*, 383 F.3d at 258; *Landeros-Gonzales*, 262 F.3d at 426.

Respondent cites to a Texas state decision, *State v. Eakins*, 71 S.W.3d 443, 445 (Tex. App. 2002), for the proposition that "the absence of a finding of 'family violence'" does not necessarily mean that the trial court considered the issue and found that family violence was *not* involved. However, in *Eakins*, there was no finding at all related to family violence; the

judge neither found that it existed nor found that it did not exist. *Id.* at 444. In Petitioner's case, the trial judge affirmatively found that there was *no* family violence. (A.R. 110.) Thus Respondent's reliance on *Eakins* is misplaced.

Petitioner states again (a) that simple assault, without the presence of certain aggravating factors is not a crime involving moral turpitude; (b) that the conviction documents at hand show that there are no such aggravating factors in Petitioner's case; and thus (c) that Petitioner cannot be removed, as a matter, of law, under 8 U.S.C. § 1182(a)(2)(A)(ii) for being an alien convicted of two or more crimes involving moral turpitude since admission to the United States. Similarly, Petitioner cannot be removed, as a matter of law, under 8 U.S.C. § 1182(a)(2)(E)(i), for being an alien who has, at any time after admission to the United States, been convicted of a crime of domestic violence.

It is true, as Respondent pointed out in footnote 3, that Petitioner conceded this ground of removability at his removal hearing. However it is also the case that Petitioner has since then repeatedly challenged such grounds for removal. Petitioner is not removable as a matter of law if he was not convicted of a crime of domestic violence, regardless of what he conceded. An alien cannot be subject to removal simply by conceding to a charge if that charge is not supportable by law. See *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (holding that court may consider an issue regardless of purported waiver if it

is purely one of law and the opposing party will not suffer prejudice); *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (holding that petitioner had not waived his right to challenge on appeal IJ's erroneous reliance on testimonial evidence outside of the record of conviction where he raised the argument before the BIA).

Thus a finding that Petitioner was convicted of simple assault leads necessarily to the conclusion that he was not convicted of a second CIMT, and thus he cannot be removed under 8 U.S.C. § 1182(a)(2)(A)(ii); and by the same argument, he cannot be found to have been convicted of domestic violence, and cannot be removed under § 1182(a)(2)(E)(i). Although Respondent states that "That assumption is incorrect," no citation or further argument is given. Resp. Br. at 5, n.3.

2. Respondent further asserts that "the immigration laws do not mandate adoption of the categorical approach at all." Resp. Br. at 8. Respondent relies on two circuit court opinions: a panel opinion authored by Judge Easterbrook in the Seventh Circuit and a dissent authored by Judge Bea in the Ninth. *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1085 (9th Cir. 2007) (en banc) (Bea, J., dissenting). Respondent appears to be arguing that the BIA may be moving away from the categorical approach, and that the Seventh and Ninth Circuits recognize and defer to that movement. Resp. Br. at 8. This is an incorrect reading of the law.

The majority of the Ninth Circuit, *en banc*, held that the *Taylor-Shepard* categorical approach is the law "established by the Supreme Court." *Navarro-Lopez*, 503 F.3d at 1067. The majority specifically rejected Judge Bea's dissent as "plainly conflict[ing] with our precedent." *Id.* at 1067 n.4. As the Ninth Circuit Court explained:

> When the crime of conviction is missing an element of the generic crime altogether, we can never find that a jury was actually required to find all the elements of the generic crime. [The crime of conviction at issue] lacks an element of the generic crime – i.e., the moral turpitude, the requisite depravity. The crime of conviction can never be narrowed to conform to the generic crime because the jury is not required – as *Taylor* mandates – to find all the elements of the generic crime. Even if Navarro-Lopez had admitted to depraved acts, those admissions could not be used to modify the crime because they were not necessary for a conviction.

Id. at 1073. Judge Bea's dissent asserted that, "The question whether a state crime qualifies as a 'crime involving moral turpitude' within the meaning of 8 U.S.C. § 1182(a)(2)(A)(i)(I) cannot be answered, as the majority attempts to do, by turning to the categorical approach of *Taylor* . . . " because "there is no federal crime [of CIMT] to define." This dissent, joined only by Judge O'Scannlain, is a thin reed on which to hang Respondent's assertion that "the immigration laws do

not mandate adoption of the categorical approach at all." Resp. Br. at 8.

Judge Easterbrook's opinion also does not challenge the *Taylor-Shepard* categorical approach; it instead holds that an immigration judge can use a "presentence report to ensure that the judgment was not a mistake" and to "make the moral-turpitude classification, a matter that stands apart from the elements of the offense." *Ali*, 521 F.3d at 743. Judge Easterbrook here classifies whether a crime is one of moral turpitude as an extra-offense characteristic, rather than an element of the crime. This is not the holding of the Fifth Circuit, and it is not the legal grounds on which the Fifth Circuit in the instant case relied. Here, the Fifth Circuit looked, not to a presentence report, but to the charging instrument to determine the nature of the Petitioner's victim – an element of the crime – and from the allegation on the charging document concluded that the IJ's determination was not unreasonable. *Ali* is irrelevant to the case at hand.

As with the crime at issue in *Navarro-Lopez*, which was accessory after the fact, the crime at issue in the instant case, which is simple assault, lacks the element of depravity. Thus it cannot be found to be a crime involving moral turpitude as the jury is not required to find the depravity element of a CIMT. Although the charging document may state that the victim was Petitioner's wife, that was not a fact that needed to be proven, nor was it a fact found by the judge. On the contrary, the judge made an affirmative

finding of fact that there was no family member involved. The IJ's finding that Petitioner was convicted of a CIMT was an error of law; the BIA's upholding of that finding was an error of law; the Fifth Circuit's opinion upholding of that finding was an error of law. The Supreme Court's precedents, in *Taylor* and *Shepard*, were not followed. This Court should not allow this to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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